

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 94-9

August 12, 1994

TO : All Regional Directors, Officers-in-Charge
and Resident Officers

FROM : Fred Feinstein
General Counsel

SUBJECT: Investigative Subpoenas

By Memorandum OM 89-73, revised September 18, 1989, in response to a recommendation contained in the Report of the General Counsel's Special Planning Committee, a new Section 11770.3 was added to the Casehandling Manual (CHM) to provide Regional Directors with broad guidance as to when authority should be sought from the Division of Operations-Management to issue investigative subpoenas. OM 89-73 provided further that as experience was gained in the utilization of the new guidance, consideration would be given to broadening the discretion granted to Regional Directors to issue investigative subpoenas without Washington clearance.

On May 13, 1993, by Memorandum OM 93-37, CHM Section 11770.2 was modified to authorize Regional Directors to issue subpoenas, both *duces tecum* and *ad testificandum*, to investigate allegations that there has been noncompliance with a court-enforced Board Order, when the conduct alleged is clearly within the scope of that Order.¹

The Board's investigative power under Section 11 is very broad. It includes the power to require responses to written questions (see EEOC v. Bay Shipbuilding Corp., 668 F.2d 304, 313 (7th Cir. 1981); EEOC v. Maryland Cup, 785 F.2d 471, 478-479 (4th Cir. 1986), cert. denied 479 U.S. 815 (1986)); to compel the production of documents (see, e.g., NLRB v. G.H.R. Energy Corp., 707 F.2d 110, 113-114 (5th Cir. 1982); EEOC v. Maryland Cup, supra, at 476-478); and to require oral testimony before the investigator concerning the matters in question (see NLRB v. Thayer, 201 F.Supp. 602, 604 (D. Mass. 1962); FTC v. Standard American, Inc., 306 F.2d 231, 233-236 (3d Cir. 1962); FTC v. Scientific Living, Inc., 150 F.Supp. 495, 497-499 (M.D. Pa. 1957), affd. 254 F.2d 598 (3d Cir. 1958), cert. denied 358 U.S. 867 (1959), rehearing denied 358 U.S. 938 (1959)). Such investigative subpoenas can be directed not only to the charged party, but to another party that might be derivatively liable for unfair labor practices (NLRB v. CCC Associates, 306 F.2d 534, 537-540 (2d Cir. 1962); NLRB v. Thayer, Inc., 201 F.Supp. at 603-

¹ See also Compliance Casehandling Manual Section 10590.2.

604); or, indeed, to any person having information relevant to the investigation (Link v. NLRB, 330 F.2d 437, 440 (4th Cir. 1964)).

The subpoena power of an administrative agency has been compared to that of a grand jury, which "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." United States v. Powell, 379 U.S. 48, 57 (1964), quoting United States v. Morton Salt Co., 338 U.S. 632, 642-643 (1950).

In light of the additional experience gained after issuance of Memorandum 89-73, we have determined that CHM Section 11770 should be further modified to accord greater discretion to Regional Directors to issue investigative subpoenas without Washington clearance in those circumstances where a charge would be dismissed for insufficient evidence because additional, potentially relevant and material evidence was not otherwise available.

Accordingly, Directors are authorized to issue investigative subpoenas *duces tecum* for the production of documents or other materials from any party or witness and investigative subpoenas *ad testificandum* to compel testimony from nonparty witnesses to secure evidence not conveniently available from other sources, when that evidence may materially aid a merit determination and when foreseeable barriers to enforceability are not present.²

The following examples, drawn from the experience of the Division of Operations-Management under outstanding instructions, demonstrate appropriate circumstances for use of investigative subpoenas. These examples are offered for illustrative purposes only, and are not to be construed as a limitation.

- A. If the Region's investigation of a Section 8(a)(3) discharge case reveals a hearsay statement by an employee evidencing an unlawful employer motive for the discharge, there is otherwise insufficient evidence of motive and the declarant refuses voluntarily to provide an affidavit, an *ad testificandum* investigative subpoena directed to the declarant would be appropriate.
- B. Where an individual charging party alleges in a Section 8(b)(1)(A) charge that a union has discriminated against him in the operation of an exclusive hiring hall because of his internal union activities and the investigation reveals evidence of the employee's activity and the charged party union's animus, but the union refuses to provide access to the

² Regional Directors are also authorized to issue *ad testificandum* subpoenas to representatives of the charged party for testimony limited to authentication or explanation of the documents subject to the subpoena *duces tecum*.

hiring hall records to determine whether there has been discrimination, a *duces tecum* subpoena requiring production of the records would be appropriate.

- C. Where evidence has been disclosed that a previously unnamed entity, which may be an alter ego, a Golden State successor, or otherwise derivatively liable, exists and it refuses voluntarily to provide access to relevant documents, an investigative subpoena *duces tecum* would be warranted to determine whether supplemental proceedings should be initiated against such entity.
- D. Where there is some evidence that a respondent is dissipating its assets and a Section 10(j) protective order or other preliminary relief might be necessary, an investigative subpoena would be warranted to determine if respondent will have sufficient assets to satisfy a backpay order issued in due course.

Procedures with respect to *ad testificandum* subpoenas issued to party witnesses remain unchanged.³ Authorization to issue investigative subpoenas to compel testimony from an agent or representative of a party must be secured from the Division of Operations-Management. In addition, as required in Memorandum 82-32, dated August 23, 1982, "Subpoenas Issued to Members of the Press," clearance should be sought where a Regional Director believes an investigative subpoena should issue upon a reporter to elicit testimony relating to information gained in his or her capacity as a reporter or requiring the production of materials secured as a result of news gathering activities. Lastly, where a Regional Director believes an investigative subpoena should issue but the standards articulated above have not been met, a request for authorization should be submitted to the Division of Operations-Management. Memorandum OM 89-73 is modified to the extent it is inconsistent with the foregoing.⁴

Finally, investigative subpoenas are no substitute for a promptly initiated, dogged and thorough pursuit of relevant evidence from cooperative sources. And, of course, Regional Directors should not engage in "fishing expeditions" with the use of investigative subpoenas, nor should they normally use precomplaint subpoenas when a *prima facie* case has been established during the investigation and the charged party refuses voluntarily to provide evidence that might be exculpatory. Rather, investigative subpoenas should only be utilized responsibly to make available to the Director the

³ But see footnote 2, above.

⁴ If otherwise applicable, the provisions of the Right to Financial Privacy Act of 1978 must be observed if an investigative subpoena is to be served on a financial institution for financial records of individuals and small partnerships. See Compliance Casehandling Manual Sections 10590.2, 10593.6 and 10601.3.

evidence he or she needs to make necessary judgments regarding whether a complaint or compliance specification should issue, absent settlement.

In order to permit the continued oversight of Agency use of investigative subpoenas, please submit to your Assistant General Counsel a copy of each investigative subpoena that you issue, together with a copy of any memorandum or other file document that explains the basis for issuance.

As in the past, problems of enforceability that arise after issuance of an investigative subpoena should be reported to the Division of Operations-Management. Please call me or your Assistant General Counsel if you have any questions concerning this memorandum.

77
F. F.

MEMORANDUM GC 94- 9